

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SANDRA PEELER,

Plaintiff,

v.

THE BOEING COMPANY, *et al.*,

Defendants.

No. C14-0552RSL

ORDER REGARDING CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT ON PLAINTIFF'S  
ACCOMMODATION CLAIM

This matter comes before the Court on “Plaintiff’s Motion for Partial Summary Judgment on Failure to Accommodate, Constructive Discharge, and Affirmative Defenses.” Dkt. # 53. In response, defendants seek judgment in their favor on the failure to accommodate claim. Dkt. # 77 at 7.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to

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1 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.  
 2 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .  
 3 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723  
 4 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the trier of fact genuine  
 5 issues regarding credibility, the weight of the evidence, and legitimate inferences, the “mere  
 6 existence of a scintilla of evidence in support of the non-moving party’s position will be  
 7 insufficient” to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049  
 8 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes  
 9 whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a  
 10 motion for summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014).  
 11 In other words, summary judgment should be granted where the nonmoving party fails to offer  
 12 evidence from which a reasonable fact finder could return a verdict in its favor.  
 13 FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

14 Having reviewed the memoranda, declarations, and exhibits submitted by the parties<sup>1</sup> and  
 15 taking the evidence in the light most favorable to the non-moving party, the Court finds as  
 16 follows:

17 Plaintiff alleges that she was constructively discharged from employment at Boeing  
 18 “because of . . . the presence of [a] sensory, mental, or physical disability,” in violation of the  
 19 Washington Law Against Discrimination (“WLAD”), RCW 49.60.180(2). In order to establish a  
 20 prima facie case that defendants failed to reasonably accommodate her post-traumatic stress  
 21 disorder and depression, plaintiff “must show that (1) the employee had a sensory, mental, or  
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23 <sup>1</sup> The parties’ evidentiary objections are overruled without prejudice to their being raised again at  
 24 trial. In evaluating defendants’ conduct, the Court has not considered facts of which defendants were  
 25 unaware at the time plaintiff was excluded from the workplace. To the extent the reasonableness of  
 26 defendants’ interpretation of Dr. Bailey’s 2013 report is at issue, however, the Court has considered his  
 subsequent testimony regarding his intent and understanding at the time.

1 physical abnormality that substantially limited his or her ability to perform the job; (2) the  
 2 employee was qualified to perform the essential functions of the job in question; (3) the  
 3 employee gave the employer notice of the abnormality and its accompanying substantial  
 4 limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were  
 5 available to the employer . . . to accommodate the abnormality.” Hill v. BCTI Income Fund-I,  
 6 144 Wn.2d 172, 192-93 (2001).<sup>2</sup> At issue in these cross-motions is whether plaintiff was  
 7 “qualified to perform the essential functions of” an aviation maintenance technician. The term  
 8 “essential functions” is derived from the WLAD’s federal counterpart, the Americans with  
 9 Disabilities Act (“ADA”), and it has been defined to mean “the *fundamental job duties* of the  
 10 employment position the individual with a disability holds or desires,” not including “the  
 11 marginal functions of the position.” Davis v. Microsoft Corp., 149 Wn.2d 521, 532 (2003)  
 12 (emphasis in original) (quoting 29 C.F.R. § 1630.2(n)(1)). An employer need not eliminate or  
 13 alter a task, service, or duty that is indispensable to the job. Pulcino v. Fed. Express Corp., 141  
 14 Wn.2d 629, 644 (2000). Thus, an employer may discharge an employee who is unable to  
 15 perform an essential function of the job without attempting to redefine the job to suit the  
 16 employee’s abilities. Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 119 (1986).

17 Plaintiff relies on the report of Dr. Tyson Bailey, a licensed clinical psychologist, to show  
 18 that she was able to perform the essential functions of an airplane mechanic. Dr. Bailey stated  
 19 that, “[f]rom a cognitive perspective, the test data consistently showed that Ms. Peeler could  
 20 perform the functions of her job when not under significant emotional distress.” Dkt. # 53 at 4  
 21 (quoting Dkt. # 54-1 at 5). Defendants do not dispute that plaintiff will, upon completion of her  
 22 training, have the cognitive and physical abilities to perform the specific tasks associated with  
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24 <sup>2</sup> Prior to 2007, the measures must also have been “medically necessary,” but that requirement  
 25 was abrogated by statute, as recognized in Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 29-30  
 (2010).

1 airplane maintenance. They argue, however, that those tasks must be performed in a workplace  
2 setting involving co-workers and supervisors and that there is evidence from which one could  
3 reasonably conclude that plaintiff is incapable of doing that. Defendants are correct. A fair  
4 reading of Dr. Bailey's report shows that he had significant concerns regarding plaintiff's ability  
5 to manage emotional distress in the workplace. Dr. Bailey noted that plaintiff experiences a  
6 chronic level of distress, that her reaction to workplace stressors was "greater than would be  
7 expected," that she "is experiencing some difficulties effectively evaluating her environment,"  
8 that "her current level of distress is drastically exceeding her coping strategies," and that she  
9 may be using avoidance and/or dissociative strategies that increase the likelihood that the stress  
10 will become unmanageable. Dkt. # 54-1 at 5-6. The testing Dr. Bailey performed revealed that,  
11 when faced with ambiguous, intense, or emotionally-charged circumstances, plaintiff becomes  
12 disorganized, experiences unexpected cognitive difficulties given her scores, and manifests  
13 emotional dysregulation. Dkt. # 54-1 at 4-6. Dr. Bailey did not think plaintiff had the coping  
14 skills to return to work as of June 2013. He therefore recommended that plaintiff participate in 6-  
15 12 months of therapy focusing on "building mindful awareness, understanding and regulating  
16 her emotions, interacting effectively with others, and getting through difficult situations without  
17 making them worse" and that she undergo another evaluation before re-entering the workforce.  
18 Dkt. # 54-1 at 6.

19 The factfinder could reasonably find that plaintiff, while cognitively able when not under  
20 emotional stress, could not manage the normal stresses of the workplace. As the Ninth Circuit  
21 recently noted, "[a]n essential function of almost every job is the ability to appropriately handle  
22 stress and interact with others." Mayo v. PCC Structural, Inc., 795 F.3d 941, 2015 WL  
23 4529357, at \*2 (9th Cir. July 28, 2015). Dr. Bailey found that when plaintiff was faced with  
24 ambiguity or intense situations, she became disorganized and answered questions randomly. In  
25 addition, plaintiff's response to stress during her training program involved both suicidal and

1 homicidal ideation. If the factfinder concludes that plaintiff did not have the skills she needed to  
 2 handle the stresses involved in working as an aviation maintenance technician during the  
 3 relevant time frame and/or that the stress led her to make serious and credible threats against her  
 4 co-workers, she would not be qualified to perform the work in question. Mayo, 2015 WL  
 5 4529357, at \* 3.<sup>3</sup> Plaintiff will undoubtedly argue that it was the harassing and discriminatory  
 6 conduct to which she was exposed that triggered her emotional dysregulation, and that if she  
 7 could be assured a “normal” workplace with appropriate accommodations, she would be fine.  
 8 This, too, is a reasonable interpretation of the evidence. The Court will not choose between two  
 9 reasonable conclusions on a motion for summary judgment.

10 Only if the trier of fact were to find that plaintiff is qualified to perform the essential  
 11 functions of the aviation maintenance technician job would the issues raised in plaintiff’s motion  
 12 come to the fore. The Court declines to determine whether there was an accommodation that  
 13 could have been provided without undue hardship and/or whether defendant discriminated  
 14 against plaintiff because of her disability until the nature and impacts of her disability have been  
 15 established at trial.<sup>4</sup> To the extent defendants have asserted a “direct threat” defense under 42  
 16 U.S.C. § 12113(b), however, they have not attempted to show that plaintiff’s return to the  
 17 workforce posed “a significant risk to the health or safety of others that cannot be eliminated by  
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19 <sup>3</sup> In Mayo, the employee threatened “to kill his co-workers in chilling detail and on multiple  
 20 occasions.” 2015 WL 4529357, at \*2. The facts of Mayo warranted a finding as a matter of law, but  
 21 were much more dramatic than the facts in this case.

22 <sup>4</sup> For example, if the trier of fact were to find that plaintiff were qualified to perform the  
 23 functions of the job in June 2013 as long as she participated in daily therapy and enjoyed a calm and  
 24 serene work environment, the trier of fact might conclude that accommodation was impossible or that a  
 25 leave of absence was the appropriate response. If, on the other hand, plaintiff’s limitations could be  
 addressed with accommodations such as noise-cancelling headphones, a safe place to retreat, and/or a  
 spot on the graveyard shift, the trier of fact could conclude that Boeing had not fully explored these  
 options before refusing to allow plaintiff to return to work.

1 reasonable accommodation.” 42 U.S.C. § 12111(3); Echazabal v. Chevron U.S.A., Inc., 336 F.3d  
2 1023, 1027 (9th Cir. 2003). Although Dr. Bailey evaluated plaintiff’s ability to perform the  
3 essential functions of her job, he did not conduct a threat assessment or specifically consider  
4 “(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he  
5 likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.” 29  
6 C.F.R. § 1630.2(r). While Dr. Bailey’s report would support a plausible argument that plaintiff’s  
7 health would be in imminent and likely jeopardy if she returned to the factory floor before  
8 acquiring adequate coping skills, the regulations are very specific regarding the kind of  
9 assessment an employer must make and against which the reasonableness of a threat  
10 determination will be measured. Echazabal, 336 F.3d at 1028. Defendants did not obtain a  
11 medical judgment on the matters specified in the regulations. Having failed to perform the  
12 required individualized threat assessment, their “direct threat” defense is unsupported.

13  
14 For all of the foregoing reasons, plaintiff’s motion for summary judgment (Dkt. # 53) is  
15 GRANTED in part. Defendants have failed to raise a genuine issue of material fact regarding  
16 their “direct threat” defense: that affirmative defense is hereby STRICKEN. Plaintiff’s other  
17 requests for judgment as a matter of law and defendants’ cross-motion (Dkt. # 77 at 7) are  
18 DENIED.

19 Dated this 30th day of October, 2015.

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21   
22 Robert S. Lasnik  
23 United States District Judge  
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